

February 3, 2012

Via EFCS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Ms. Dortch:

Re: Written Ex Parte Presentation, WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 07-135; WC Docket No. 05-337; CC Docket No. 01-92; CC Docket No. 96-45; WC Docket No. 03-109; WT Docket 10-208

YMax Communications Corp. (“YMax”) seeks confirmation that it is properly interpreting the Commission’s *Report and Order and Further Notice of Proposed Rulemaking* (“ICC Reform Order” or “Order”) in the above-captioned proceedings.¹ Specifically, YMax asks the Commission to confirm that under its new VoIP-PSTN “symmetry” rule, a LEC is performing the functional equivalent of ILEC access service, and therefore entitled to charge the full “benchmark” rate level, whenever it is providing telephone numbers and some portion of the interconnection with the PSTN, and regardless of how or by whom the last-mile transmission is provided.

In the ICC Reform Order the Commission determined that LECs providing wholesale services to retail VoIP providers should be able to collect all the same intercarrier compensation charges as LECs relying entirely on TDM networks, regardless of how the relationship with their retail VoIP service partners is structured and regardless of whether the functions performed or the technology used correspond to those used under a traditional TDM architecture.²

YMax applauds the Commission’s ruling, as well as its underlying policy finding that “a symmetric approach to VoIP-PSTN intercarrier compensation is warranted *for all LECs*.”³

¹ See *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (ICC Reform Order).

² ICC Reform Order at ¶¶ 968-970, and 47 CFR § 51.913.

³ *Id.* at ¶ 968 (*emphasis added*).

The Commission went on to say, however, that its rules “do not permit a LEC to charge for functions performed neither by itself [n]or its retail service provider partner,” and cited *AT&T Corp. v. YMax Communications Corp.*, 26 FCC Rcd 5742 (2011) (the “*YMax Order*”) as illustrating that situation.⁴ The Commission elaborated in a footnote that “although access services might functionally be accomplished in different ways depending upon the network technology, the right to charge does not extend to functions not performed by the LEC or its retail VoIP service provider partner,”⁵ and codified this exception in the text of its rules.⁶

Judging from the paragraphs of the *YMax Order* that it references, the Commission might appear to be suggesting that if the physical transmission facilities connecting the IXC and the VoIP service customer are provided in part by one or more unrelated ISPs (as is the case with YMax or “over-the-top” VoIP providers such as Skype or Vonage), then the LEC and its VoIP service partner are not performing the “access” function and cannot charge for it.⁷

YMax does not believe that is what the Commission actually ruled, for the reasons outlined below. However, YMax suspects that one or more IXCs may claim that the Commission’s “functions not performed” exception permits them to refuse to compensate YMax for VoIP-PSTN traffic under the ICC Reform Order. Confirming now the proper interpretation of the Order and its implementing regulations in this respect would help prevent disputes, another key goal of the Order.⁸

The central question is this: under the Commission’s new VoIP-PSTN symmetry rule, what is the baseline access function or functions that a CLEC must be performing in order to be allowed to charge the equivalent of full ILEC switched access rates, and without which the “functions not performed” exception applies? YMax believes the answer lies in the industry proposals on which the Commission’s rule was based, and in the revisions to 47 CFR § 61.26 the Commission adopted in order to address this issue.

The VoIP-PSTN symmetry rule is based on proposals filed by several

⁴ *Id.* at ¶ 970 and nn. 2026, 2028. How the new VoIP-PSTN symmetry rule enunciated in the ICC Reform Order should be interpreted and applied prospectively – the subject of this letter -- is an entirely separate matter from the issues decided in the *YMax Order* and currently under reconsideration. YMax does not express any opinion here on the issues being litigated in the complaint proceeding (which concern the parties’ rights and obligations under YMax’s previous tariff language and the pre-Order regime), and is not asking here for any Commission attention or action on those issues outside of that proceeding.

⁵ *Id.* at ¶ 970, n. 2028.

⁶ See 47 CFR § 51.913(b) (“This rule does not permit a local exchange carrier to charge for functions not performed by the local exchange carrier itself or the affiliated or unaffiliated provider of interconnected VoIP service or non-interconnected VoIP service.”).

⁷ See paragraphs 41 and 44, n. 120, of the *YMax Order*, cited in the ICC Reform Order at ¶ 970, n. 2028.

⁸ See, e.g., ICC Reform Order at ¶ 930.

commenting parties and cited in the ICC Reform Order at ¶¶ 968–970.⁹ Under those proposals it is not necessary for either the LEC or its VoIP service partner to be using a TDM-based “end office” switch¹⁰ or providing “loop facilities” or any other physical connection to the VoIP customer¹¹ in order for the LEC to collect full access charges. Even AT&T, which vehemently opposed adoption of the VoIP-PSTN symmetry rule and now seeks to overturn it on appeal,¹² conceded that the proposal ultimately adopted would permit CLECs to collect full benchmark switched access charges “even when those CLECs perform few, if any, of the benchmark functions identified in the Commission’s rules,” and even for “functions actually being performed by ISPs who receive PSTN-to-IP calls from those CLECs and route them over Internet backbones, middle mile facilities, and broadband Internet access connections for termination to customers of “over the top” VoIP services.”¹³

If “few, if any” of the traditional TDM-based ILEC access functions are required in order for a CLEC to collect full access charges on VoIP-PSTN traffic, what is the minimum functionality required? This, too, was addressed by the parties that proposed the symmetry rule, and accepted by the Commission.

In its *August 3 PN* Comments, Level 3 pointed out that “because the access charge rules differentiate between situations in which LECs provide end office functionality and ones in which they provide only transit, it is important for there to be a clear rule as to when a LEC is providing end office functionality and therefore can collect end office switching access charges, either originating or terminating.”¹⁴ Level 3 therefore urged the Commission to “establish a bright-line test that defines a LEC to be eligible to receive end office switched access charges when it is identified in the NPAC database as providing the calling party or dialed number.”¹⁵ In an *ex parte* filing dated September 22, Comcast put that concept into the form of a proposed text change to the existing CLEC benchmark regulation, 47 CFR § 61.26. Specifically, Comcast proposed adding language to paragraph (f) of that regulation stating that “if [a] CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.”¹⁶

⁹ See, e.g., Comcast *August 3 PN* Comments at 5-8; NCTA *August 3 PN* Comments at 17-19; Time Warner Cable *August 3 PN* Comments at 9-10; Level 3 *August 3 PN* Comments at 21-14; Time Warner Cable-Cox Sept. 21, 2011 *Ex Parte* Letter; Comcast Sept. 22, 2011 *Ex Parte* Letter.

¹⁰ See, e.g., Comcast *August 3 PN* Comments at 7.

¹¹ See, e.g., Level 3 *August 3 PN* Comments at 22.

¹² See *AT&T, Inc., v. FCC and USA*, 10th Cir. No. 11-9591.

¹³ AT&T Oct. 21, 2011 *Ex Parte* Letter at 1-2.

¹⁴ Level 3 *August 3 PN* Comments at 21.

¹⁵ *Id.* at 21-24.

¹⁶ Comcast Sept. 22, 2011 *Ex Parte* Letter.

Similar language was proposed in other filings.¹⁷ The Commission adopted the proposed language in the final rules it promulgated with the Order, revising Section 61.26(f) as follows:

If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

Although the Commission did not discuss this rule revision in paragraph 970 or anywhere else in the text of its Order, its purpose was clearly to implement the “bright line” rule urged by Level 3, Comcast and others, and to avoid future disputes by expressly defining the minimum access functionality necessary in order for a CLEC to be allowed to collect access charges at the full benchmark level under the VoIP-PSTN symmetry rule.

The Commission also revised the definition of “switched exchange access services” in the CLEC benchmark rule to include

[t]he termination of interexchange telecommunications traffic to any end user, either directly or via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. § 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. § 153(36), that does not itself seek to collect reciprocal compensation charges prescribed by this subpart for that traffic, regardless of the specific functions provided or facilities used.¹⁸

Putting all the pieces together, it seems beyond dispute that whenever a CLEC is providing “some portion” of the interconnection required to complete VoIP-PSTN calls and is listed in the NPAC database as providing the associated telephone numbers, then the CLEC is providing “switched exchange access services” and may collect the full benchmark rate level. So long as neither the VoIP service provider nor any other provider in the chain is also seeking to collect access charges on the call there is no double-billing problem, and because the CLEC’s rate is benchmarked against the competing ILEC rate the IXC is paying no more to originate or terminate

¹⁷ See, e.g., Comcast/Time Warner Cable/Cox October 5, 2011, *Ex Parte* letter.

¹⁸ 47 CFR § 61.26(a)(3)(ii).

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the VoIP-PSTN call than it would have paid in an all-TDM scenario – the central policy behind the “symmetry” rule.

In order to avoid costly and disruptive disputes, YMax requests the Commission to confirm that its reading of the Order is correct.

Respectfully submitted,

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